

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

TYSON L. TAYLOR,

Plaintiff,

Civil No. 07-175-AS

v.

O R D E R

S. WILHELM, C. MACKLEY, T. IVERSON,
G. CHRISTESON, D. DIAMOND, and
MS. CARLBOMB,

Defendant.

HAGGERTY, Chief Judge:

Magistrate Judge Ashmanskas issued a Findings and Recommendation [27] in this action that recommended that defendants' Motion for Summary Judgment [17] should be construed as an Unenumerated Rule 12B Motion to Dismiss and granted, and that this action should be dismissed without prejudice.

No objections were filed to this Findings and Recommendation, and the case was referred to me. The matter is now before me pursuant to 28 U.S.C. § 636(b)(1)(B) and Federal Rule of Civil Procedure 72(b). When no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation of the Magistrate. *Campbell v. United States Dist. Ct.*, 501 F.2d 196 (9th Cir. 1974).

No clear error appears on the face of the record. This court adopts the Magistrate Judge's Findings and Recommendation.

CONCLUSION

The Magistrate Judge's Findings and Recommendation [27] is adopted. The Findings and Recommendation concluded correctly that plaintiff failed to fully exhaust his appeal opportunities, and that in this circuit, the proper method for a defendant to assert the affirmative defense of failure to exhaust is an unenumerated motion to dismiss as a matter in abatement, not through a motion for summary judgment. The court correctly construed defendants' motion [17] as such and, correctly recommended granting that motion, dismissing plaintiff's claims without prejudice. A Judgment of dismissal without prejudice shall issue separately.

IT IS SO ORDERED.

Dated this 23 day of January, 2008.

/s/ Ancer L. Haggerty
Ancer L. Haggerty
United States District Judge